

**A New Model for Managing Labor-Management Conflicts
With Early Third Party Intervention**

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More than sixty years ago, the United States Congress recognized the need for third-party intervention in labor-management disputes to prevent or minimize interruptions to the free flow of commerce. The Federal Mediation and Conciliation Service (FMCS) was established in 1947 by the Labor Management Relations Act (Taft-Hartley) amendments to the National Labor Relations Act (NLRA) as an independent agency whose mission is “to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.”¹ Subsequent acts of Congress and presidential orders have expanded the FMCS’s role to include promoting labor-management relationships in the private and public sectors as well as providing employment-based mediation services to the private sector and alternative dispute resolution (ADR) programs to government agencies.

Over the years, the FMCS has demonstrated the value of third-party intervention to improving labor-management relationships and, thus, preventing workplace conflicts. Through mediation and other programs designed to improve labor-management relationships and organizational effectiveness, FMCS mediators routinely help parties manage their unavoidable conflicts. As the needs and the challenges confronting workplace relationships have changed over time, so, too, have the means and methods utilized by FMCS to help parties meet these challenges.

Without doubt, one of the most important factors in the success of the Agency’s efforts is the timing of its intervention. Waiting until a collective bargaining agreement expires to attempt to resolve the myriad of complex issues facing workers and companies today is a recipe for disaster. The FMCS, therefore, uses a variety of early intervention programs, such as early offers of collective bargaining mediation and ongoing promotion of relationship development programs, to provide labor and management the tools to better manage conflict, and, perhaps most importantly, given these extremely difficult economic times, a new model of proactive outreach and intensive intervention for

¹ 29 USC § 173. By statute, FMCS’s jurisdiction excludes the rail and airline industries, which are covered by the National Mediation Board under the Railway Labor Act.

the most complex and divisive issues and in the most troubled sectors in our economy.

In Part I below, for illustrative purposes, we describe our new relationship building model of early, proactive intervention and outreach in the areas of health care bargaining, the steel industry, public education reform, and federal sector collaboration and bargaining. We then describe, in Part II, some traditional FMCS early intervention programs and services, such as early collective bargaining mediation, grievance mediation, relationship development training, and other alternative dispute resolution models.

Part I: Building Relationships -- A New Model of Early Intervention

The volatile world economy continues to have a severe impact on the U.S. workplace. Unemployment remains unacceptably high, with many private employers unwilling to risk resumption of pre-recession employment levels, let alone expansion, and with the public sector beset by unprecedented budget deficits. The deep and persistent economic downturn will continue to dominate collective bargaining in the months and years ahead, just as it has for the past three years.

One evident manifestation of these uncertain economic times is the fraying of labor-management relationships. Companies and unions that were able to resolve most conflicts during periods of economic growth often find themselves unable to bridge the enormous divide created by a sharply altered economic playing field. State and local governments that historically were able to absorb wage and benefit increases for their workers have resorted to demanding concessions as their existing tax bases and revenue streams have decreased.

Perhaps the most important lesson FMCS has learned from extensive “hands-on” experience is that what the parties’ need most during difficult economic times where confrontational issues abound is a strong labor-management relationship in which those issues can be discussed constructively so that joint solutions can be achieved. To that end, the FMCS helps parties achieve this essential relationship through carefully honed outreach and relationship development programs. Every day, FMCS mediators, in a variety of ways, offer parties broad-based assistance, with a view toward encouraging relationship improvement far in advance of the trauma of contract expiration to avoid or at least minimize the threat of a strike, lockout, or unilateral contract imposition.

A. Solving health care benefit challenges through labor-management collaboration

Pension benefits, job security, and the costs of employer-provided health care remain among the most contentious issues in private and public sector

negotiations. After reviewing the overall state of collective bargaining during 2010, it became clear that the costs of employer-provided health care were the *single* most persistent cause of collective bargaining disputes throughout the nation, irrespective of industry or sector -- manufacturing, construction, retail, entertainment, high tech, health care facilities or public sector. Contractual and plan changes required by a comprehensive and controversial new law, the Patient Protection and Affordable Care Act of 2010 (the "Affordable Care Act"), added to what was already an exceedingly conflict-ridden subject of bargaining.² The stage was thus set for an increasing number of major confrontations arising out of disputes about cost shifting, cost containment, chronic disease management, prevention, and wellness. And, of course, these issues not only implicated the economics of health care delivery, but also the emotionally-charged subjects of personal responsibility, privacy, and behavioral change. For example, we are repeatedly warned that in our country the percentage of obese men and women, especially wage earners, is approaching epidemic proportions. Obesity has been increasingly associated with such life-threatening illnesses as diabetes, hypertension, and heart disease. Indeed, a report of the Center for Disease Control and Prevention warns that an estimated 72.5 million adults in the U.S. are obese and this fact alone may cost the medical system as much as \$145 billion annually.³ Innovative new wellness and/or disease prevention programs show great potential for reversing these trends, but the personal and societal changes needed for widespread behavioral change are daunting.

It was in this context that FMCS initiated a new model of proactive intervention and relationship building. After conferring with labor and management health care experts, service providers, and plan design professionals, a broad consensus emerged on two key factors. First, negotiations over health care are simply too complicated and contentious to wait until the typical 30-60 days prior to contract expiration when parties often begin to address contract modification. Second, the painfully difficult issues of cost

² Pub.L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029 (2010). The Affordable Care Act seeks to reduce the number of Americans without healthcare coverage, mostly by altering the provision of private health care delivery and health insurance. The Act's five major reforms are: (1) the regulation of private insurers' underwriting practices including guaranteed insurance of coverage and a minimum package of benefits; (2) creation of state-run insurance pools, "Health Benefit Exchanges," for certain classes of purchasers; (3) a government mandate that all individuals must either purchase and maintain insurance coverage or pay fines; (4) penalties on private employers who do not offer their employees health coverage; and (5) the expansion of Medicaid eligibility and subsidies. *Florida v. U.S. Dep't of Health and Human Services*, Nos. 11-11021, 11-11067, _ F.3d _, 2011 WL 3519178, * at 10 (11th Cir. Aug. 12, 2011). So far, two circuit courts of the U.S. Court of Appeals have disagreed as to the constitutionality of the individual mandate. *Id.* (individual mandate is unconstitutional); *Thomas More Law Center v. Obama*, No. 10-2388, _F.3d _, 2011 WL 2556039 (6th Cir. June 29, 2011)(individual mandate is facially constitutional under Commerce Clause, but not under the Taxing Power). Because of the "circuit split" on this issue, some consider it likely that the United States Supreme Court will grant certiorari and review the issue soon. Michael Cooper, "Health Law is Dealt Blow by a Court on Mandate," *N.Y. Times*, Aug. 13, 2011, at A11.

³ National Center for Chronic Disease Prevention and Health Promotion, Center for Disease Control, *At a Glance: Obesity Halting the Epidemic by Making Health Easier* (2011).

shifting, cost containment, disease management, wellness, and personal responsibility can *only* be addressed successfully if the parties have a relationship and a process for decision-making based on trust, transparency, and a commitment to joint problem solving.

These two key elements, we learned, had already been practiced with noteworthy success by a handful of collective bargaining partners. These unions and companies established joint labor-management cooperative health care committees which regularly met in an informal setting far in advance of contract expiration. Both sides also demonstrated, by their conduct, a fundamental commitment to a relationship in which the views of workers were valued and respected, information was freely and openly exchanged, and a process for collaborative problem solving was observed and honored at the highest levels of management and the union.

The FMCS concluded that these success stories and best practices should be shared to the maximum extent possible with the labor management community. We sponsored a series of three one-day seminars, titled *Working Together: Labor-Management Solutions to the Health Care Challenge*, late last year in Chicago, New York City and San Francisco. The seminars were designed “to spread the word” to labor and management that a number of their colleagues already had created the processes and developed the relationships necessary to bring about previously unattainable revisions in health care costs and delivery. Hundreds of attendees were exposed to remarkable achievements grounded in transparency, trust, and respectful relationships. And, they learned about FMCS programs and services available to help them achieve similar success. We are cautiously optimistic that this model of early, proactive outreach and relationship building will help the labor-management community meet the continuing challenges inherent in bargaining over employer-provided health care benefits.

B. Relationship building: a major asset to the steel industry

Arcelor-Mittal and the United Steelworkers of America (USWA) provide another noteworthy example of the FMCS model of early, proactive outreach and intervention. Arcelor-Mittal is a high-profile international corporation that currently is the single largest steel manufacturer in the world. In the last decade, the company acquired six U.S.-based steel companies, which were then competing with each other in the national and international steel markets. The USWA was the bargaining representative for production and maintenance employees at each of the six predecessor companies and succeeded to that status with Arcelor. Both the company and union have acknowledged the extremely adversarial and dysfunctional relationship that existed during the early stages of Arcelor’s acquisition. Ultimately, Arcelor’s top leadership concluded that the situation was counter-productive and that nothing less than a cultural revolution at every level within its organization was necessary to fix it.

As a result, in July 2009, and as a vital element of a comprehensive collective bargaining agreement, the parties created a labor-management partnership with an exceptionally ambitious agenda: to improve product quality and production efficiency; to improve the health and safety of its employees; to improve their quality of life in their working environment; and, more generally, to promote employee involvement in problem solving and to advance company-union relations throughout the organization.

To accomplish these expansive goals, the parties turned to the FMCS for assistance. In addition to providing seed money through the FMCS's labor-management grants program,⁴ FMCS mediators are actively involved in one of the most far-reaching labor-management projects in our history. Partnership coordinators selected by each party, together with FMCS mediators, have conducted a series of local labor-management committee meetings at ten individual facilities in Illinois, Indiana, Ohio, Minnesota, Pennsylvania, West Virginia, and South Carolina—all designed to introduce plant-level management and local union representatives to the advantages of conducting themselves in a joint, problem-solving mode and to introduce them to available FMCS resources and services for solving day-to-day plant level issues. The early signs of this undertaking have been very positive and strongly suggest that this program will be a model for other parties contemplating the creation of their own partnerships.

C. *Advancing student achievement through labor-management collaboration*

To this point, our focus has been on the FMCS's new model of proactive early intervention and relationship development in the private sector. There is an equally important public sector initiative which provides a significant and highly instructive case study of the value of relationship building.

In the United States, alarm bells have been ringing about the quality of public education since a 1983 landmark government-sponsored study, *A Nation at Risk*, declared that "the educational foundations of [U.S.] society are presently being eroded by a rising tide of mediocrity that threatens our very future as a

⁴ Congress recognized the desirability of joint labor-management cooperative ventures years ago when it passed the Labor Management Cooperation Act of 1978. Pub.L. No. 95-524, 92 Stat. 1909 (1978). It authorizes and directs the FMCS to encourage and support joint labor-management committees ". . . established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern." Id. at § 6(c)(2)(B). Congress funds this initiative in the FMCS's annual appropriations, and grants are distributed to encourage labor-management committees to develop innovative joint approaches to workplace problems. In FY 2010 and 2011, the FMCS awarded 10 new competitive grants at a cost of \$750,000 annually. These grants are supporting labor-management committees tackling a wide variety of important issues concerning, for example, health care, job safety, work-life balance, and the flexibility needed to pursue new worthwhile business opportunities such as green jobs.

Nation and a people.”⁵ Although the report generated a multi-decade effort to reform public education, the harsh realities of underperforming schools and underachieving students persist.

The current U.S. Secretary of Education, Arne Duncan, provided the most recent discouraging assessment of public education in America: *fully one quarter of all high school students drop out or fail to graduate on time*.⁶ A 2009 report by retired U.S. military leaders concerning armed forces recruitment found that more than 20% of recent high school graduates were unable to enlist in the military because they did not possess the necessary math, reading, science and problem-solving skills to pass the Armed Forces Qualifications Test.⁷ The stark reality is that in 2009 the United States ranked 17th among the 65 nations participating in the (OECD) Program for International Assessment, based on the results of an international sampling of reading, math and science skills among 15-year-olds conducted every three years.⁸ What these discouraging statistics mean, in the apt words of President Obama, is that “whoever out-educates us today is going to out-compete us tomorrow.”⁹

It is against this persistent and dispiriting background that improving public education has once again become a national priority. This time, however, the debate has largely been framed by critics, armed with standardized student test scores, who single out allegedly incompetent, union-protected teachers, as the primary cause of student failure. Their current focus is on what teacher unions have achieved through their collectively bargained job protections and lay-off procedures. In the words of former New York City Schools Chancellor, Joel Klein, an outspoken critic of those teacher rights, “the long-standing holy trinity in education—life tenure, seniority, and lock-step pay (followed by a lifetime pension)—encourages sticking around rather than doing well. You can expect that in an effort to truly professionalize teaching, the assault on this established, dysfunctional structure will be vigorous.”¹⁰

The cure-all remedy espoused by Klein and other like-minded critics is an overhaul or complete abolition of teacher seniority and tenure systems and the implementation of teacher evaluation systems based in whole or in part on student test scores. Not surprisingly, teachers and their union leaders strongly object to being vilified for all underachieving students. They maintain that not only do the vast majority of teachers perform satisfactorily, but also that a host of

⁵ National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*, at 9.

⁶ Thomas L. Friedman, “Teaching for America,” *NY Times*, November 21, 2010.

⁷ The Education Trust, *Shut Out of the Military* (Washington, D.C., December 20, 2010).

⁸ Organization for Economic Cooperation and Development, *Program for International Student Assessment* (2009).

⁹ President Barack Obama, transcript of remarks at an event for Senator Barbara Boxer, Los Angeles, CA, the White House, October 22, 2010.

¹⁰ Joel I. Klein, “The New Reformers,” *The New York Times*, June 12, 2011

factors – outside the classroom – directly and substantially impact student achievement, including socio-economic disparities and uneven resources.

Moreover, many respected professionals in the education community have underscored the very real danger of according test scores a preeminent place in teacher evaluations and compensation. They note that if student test scores become the be-all and end-all barometer of teacher performance, there will be a further incentive (in addition to budgetary) to cut from curricula subjects for which there are no standardized tests but which assuredly are critical to the development of a well-rounded student —subjects like poetry, art and even history.¹¹ In addition, it is not hard to imagine teachers adapting practical defense mechanisms to such evaluations — “okay, so be it, we will teach to the test despite the negative impact this will have on genuine learning.”¹²

The FMCS’s involvement in the current conflict over education reform was triggered by a high-profile dispute between a Rhode Island school district and its American Federation of Teachers (AFT) local union. In February, 2010, the Superintendent of the Central Falls School District notified all 89 AFT-represented teachers that they would be dismissed at the end of the school year and forced to reapply for their positions because of poor student performance, even though *not one* of these teachers had received an unsatisfactory evaluation. This dramatic act sparked national media attention and strong reactions, including an AFT lawsuit for immediate injunctive relief.

Consistent with our new proactive model, FMCS reached out to top officials from the AFT, the Department of Education, and the Rhode Island State Department of Education. Those behind-the-scenes contacts ultimately succeeded in producing a joint formal request for mediator assistance. Over the course of the next 60 days, those individuals, in conjunction with the Director, explored an array of possible solutions while our assigned senior mediator met regularly with the parties. We were all extremely gratified when the mediation succeeded in achieving the goal of accommodating the educational needs of the students while avoiding the highly inflammatory, legally suspect mass dismissal initiative.

Following the resolution of the Rhode Island dispute, FMCS began an intensive review of previous school reform efforts and the strategies and best practices that produced meaningful reforms. In one highly acclaimed study, for example, the authors examined six school districts with exemplary track records of innovative reform. In each case, the study revealed that it was a strong partnership between the school district and its teachers’ union that

¹¹ Carol Burris and Kevin Weiner, “Five Reasons Parents Should Oppose Evaluating Teachers on Test Scores,” The Answer Sheet, *The Washington Post* online, June 5, 2011.

¹² Ibid.

demonstratively improved student performance and the overall quality of the schools.¹³

Experience acquired from the FMCS grant program provided further insights. In 2008, faced with a financial crisis, declining student enrollment, public demand for performance improvements, decreased property values and a diminishing student population, the Charlotte County (Florida) school district was embroiled in contentious contract negotiations with its teacher unions. Fortunately, with mediation and training support from FMCS in previous years, including an FMCS grant to fund the establishment of a labor-management council, the Charlotte County School Board, Charlotte Florida Education Association, and the Charlotte County Support Personnel Association had developed a highly effective partnership. Re-establishing this productive relationship with the renewed help of an assigned FMCS mediator, the parties then successfully worked through the challenges of their 2008 negotiation.

Notably, it was this effective partnership in what once had been a subpar Florida school system that brought about marked improvements in student performance. The previously dismal graduation rate in the Charlotte County Public Schools has increased from 68 percent to 85 percent last year. Advanced Placement Test scores rose from 12th in Florida in 2004 to first place in the state in recent results. Equally impressive, Scholastic Aptitude Test scores in reading, math and writing for Charlotte County students have shown a 21 percent increase since 2004.¹⁴

Armed with this academic research and empirical evidence, FMCS once again put its early proactive outreach model into action. We arranged for discussions with high-level Department of Education officials in which we offered mediation, facilitation, and relationship training assistance at every level of the education reform process. Fortuitously, those discussions dovetailed with Secretary Duncan's initiative to advance student achievement through labor-management collaboration. The FMCS was honored to be asked by the Secretary to partner with the Department of Education, the two major teachers' unions, AFT and the National Education Association (NEA), and the organizations representing school administrators, school boards, and major urban school systems (American Association of School Administrators, the National School Boards Association and the Council of the Great City Schools).¹⁵ To launch the Secretary's initiative, the partners agreed to co-sponsor a major

¹³ American Rights at Work, *Partnerships in Education: How Labor-Management Collaboration Is Transforming Public Schools* (2011).

¹⁴ Charlotte County Public Schools, *Collaborating for Student Success* (2011).

¹⁵ The American Association of School Administrators has a membership of 13,000 educational leaders from the United States and around the world; the National School Boards Association represents its State Association members and their more than 90,000 local school board members; the Council of Great City Schools is a coalition of 66 of the largest urban public school systems in the United States.

conference in Denver, Colorado on February 15-16, 2011, called “Advancing Student Achievement through Labor-Management Collaboration.”¹⁶

Secretary Duncan set the theme for this visionary effort to reform our public school systems when he announced that “[w]e have seen how good LM relations can create the conditions that drive student success so we want to bring together leaders in labor and management who are committed to collaboration and bold reforms.” He went on to stress that “[d]istricts and teachers’ unions must forge new compacts—compacts in which [all the parties] acknowledge their shared responsibility to establish a strong and stable school environment, and give educators resources and tools to transform all schools so that all students receive a genuine opportunity to obtain a high quality education.”¹⁷

The conference was attended by 150 school districts (representing urban, suburban, and rural areas of varying sizes and geographical locations) that applied to and were accepted by the Department of Education *only* if the superintendent, together with the local union president and school board chairman agreed to attend as a team and pledged, in writing, to advancing student achievement through negotiating reform-oriented collective bargaining agreements. The highlight of that conference was provided by representatives of 13 selected school districts and their local unions who shared the details of their “best practices” in joint problem solving on a host of core reform issues.

Following the Denver conference, FMCS had the distinct privilege of facilitating a pioneering effort between the AFT and the American Association of School Administrators (AASA) aimed at providing their respective constituencies an agreed-upon general framework for addressing core education reform issues. FMCS facilitated a series of joint meetings, attended by the organizations’ top leadership, that resulted in a groundbreaking and comprehensive 25-page document captioned “*Educator Quality for the Twenty-first Century: A Collaborative Effort of the American Association of School Administrators and the American Federation of Teachers (AFT-AASA Framework)*.”¹⁸

¹⁶In advance of the Denver conference, FMCS senior managers and mediators with experience in public school bargaining held a “brainstorming” session in which they shared the Agency’s real world perspective with officials from the Department of Education and the teacher unions. Thereafter, the FMCS produced a set of “best practices” to advance student achievement through more cooperative labor-management relationships. Among the core issues identified by FMCS mediators were: the need to establish objective, fair, and rigorous teacher evaluation processes designed to identify and remedy individual teacher deficiencies; tutoring of underachieving students after school hours and the related compensation issues; exploring the possibility of extending the length of the school day and/or the length of the school calendar and its attendant cost implications; the relationship, if any, between student test scores and teacher evaluations and/or compensation; the merit pay issue; and the relationship between providing high-quality education and teacher tenure and seniority rights.

¹⁷“Statement of Purpose,” Labor-Management Collaboration Conference, U.S. Department of Education, Denver, Colorado, February 15, 2011.

¹⁸Available at <http://www.aft.org/pdfs/teachers/AFTAASA062811.pdf>. A list of what is envisioned by this agreed-upon framework offers an insight into the challenges that lie ahead for the thousands of our school

The AFT-AASA Framework pinpointed the threshold principle the parties deemed critical to reforming our current educational system – namely, the support and development of the educator workforce. “As a first concrete step we need to systemically recruit, develop and retain great educators... [we] have adopted a framework to continuously improve the nation’s teaching force, revamp teacher development and evaluations systems, and provide teachers and schools the tools and support they need.”¹⁹ The sheer breadth of the AFT-AASA Framework provides hope that labor-management collaboration in school districts throughout the country will become the model that finally will engender positive and long lasting public education reform. While much work remains to be done, the FMCS has made clear that, as part of its proactive, early outreach and intervention model, we will be poised to support these reform efforts.

D. Federal sector relationship development and bargaining

1. The FMCS is also responsible for helping to achieve stable labor-management relations throughout the Federal Government. In December 2009, President Obama issued an Executive Order to “promote satisfactory labor relations and improve the productivity and effectiveness of the Federal Government.” The policy behind Executive Order 13522, as set forth in Section 1, is worth quoting:

Federal employees and their union representatives are an essential source of front-line ideas and information about the realities of delivering Government services to the American people. A non-adversarial forum for managers, employees, and employees' union representatives to discuss Government operations will promote satisfactory labor relations and improve the productivity and effectiveness of the Federal Government. Labor-management forums, as complements to the existing collective

districts and their leaders: (1) establishing professional teaching standards; (2) creating a fair, objective, and comprehensive system for evaluating teacher performance that accords due process; (3) a procedure that includes regular observations of teachers by administrators and other qualified persons (master teachers, for example); (4) identifying specific teacher deficiencies and promptly advising the teacher of them, both orally and in writing; (5) an improvement team (preferably peer instructional experts) reviews the evaluation and conducts its own observations to confirm the unsatisfactory performance. A program for improving the teacher performance—the improvement plan— is established after input from the teacher, the evaluator, and the improvement team; (6) the improvement plan provides clearly articulated measures of success, necessary timelines, and resources and support to meet the teacher’s particular needs. All parties should sign off on the plan; (7) follow-up observations are conducted to assess whether the teacher has progressed consistent with the improvement plan, including regular and timely feedback to the teacher; (8) no improvement plan should continue for more than the equivalent of one school year; (9) at the conclusion of that period, the administrator makes a recommendation to the school district which is to be reviewed by a neutral third party (e.g., joint labor-management committee). The standard of review is whether the district complied with the entire agreed upon evaluation process described above.

¹⁹ AFT and AASA, “Groundbreaking Partnership Will Revamp Teacher Workforce,” June 29, 2010, available at: <http://www.aft.org/newspubs/press/2011/062911.cfm>.

bargaining process, will allow managers and employees to collaborate in continuing to deliver the highest quality services to the American people. Management should discuss workplace challenges and problems with labor and endeavor to develop solutions jointly, rather than advise union representatives of predetermined solutions to problems and then engage in bargaining over the impact and implementation of the predetermined solutions. The purpose of this order is to establish a cooperative and productive form of labor-management relations throughout the executive branch.²⁰

To implement this policy, Executive Order 13522 requires all federal agencies to establish “labor-management forums [that] allow managers and employees to collaborate in continuing to deliver the highest quality services to the American people.” This Presidential mandate provided another perfect opportunity for implementing the FMCS’s proactive outreach and intervention model.

Thus, within days of the issuance of this Executive Order, the FMCS reached out to the Director of the Office of Personnel Management, the primary U.S. agency tasked with implementing the Order, and offered the full support of the Agency and its staff. When this offer was enthusiastically accepted, FMCS, as its first step, began working with the Federal Labor Relations Authority (FLRA) Office of the General Counsel, to craft an appropriate training program. In the two-day joint session, FLRA attorneys instructed paired labor and management participants on the first day about the duty and scope of bargaining, including permissive subjects of bargaining under the federal bargaining law, as well as the use of pre-decisional involvement as a tool for more effective labor-management relations. On the second day of training, FMCS mediators provided participants with information and interactive skill building on effective labor-management forum design, consensual decision-making, facilitation, and other skills needed for successful forum implementation.

To date, in excess of 200 training sessions have been delivered to federal agency labor-management teams. FMCS mediators are also involved in more than 20 ongoing labor-management forum facilitations and at least two pilot bargaining projects concerning what we refer to as “permissive subjects” of bargaining. A wide range of departments and agencies are being served: the Departments of the Treasury, Defense, Homeland Security, Health and Human Services, Veterans Affairs, Labor, Agriculture, the Army and the Navy, the Office of Personnel Management, the Federal Aviation Administration, the National Labor Relations Board, the Peace Corps, and the Marine Corps.

This joint training has been highly acclaimed, thereby generating a demand for additional training, especially from large agencies with multiple

²⁰ Exec. Order No. 13522, 74 Fed. Reg. 13,522 (Dec. 9, 2009).

bargaining units. In response, the FLRA and FMCS developed and are now delivering a consolidated one-day joint training program. In addition, FMCS was tasked by the National Council on Federal Labor-Management Relations, the entity created to oversee the implementation of Executive Order 13522, to develop an innovative “train-the-trainer” program to greatly expand the opportunities for training and forum development throughout thousands of Federal Government bargaining units.²¹

2. The FMCS also recently received another critical and sensitive assignment relating to collective bargaining and federal security personnel. The Transportation Security Administration (TSA) was created in the wake of the 9/11 terrorist attacks to strengthen the security of the U.S. transportation systems while also seeking to ensure freedom of movement for people and commerce. Within a year, TSA assumed responsibility for security at the nation’s airports and deployed a federal workforce to meet Congressional deadlines for screening all commercial airline passengers and baggage.

Despite the fact that unionization and collective bargaining is commonplace for other government security personnel, including most state and local law enforcement officials and other federal security employees, on January 8, 2003, Under Secretary of Transportation for Security James Loy denied Transportation Security Officers (TSOs) collective bargaining rights, stating that: “Fighting terrorism demands a flexible work force that can rapidly respond to threats ... [which is] not compatible with the duty to bargain with labor unions.”²² Earlier this year, however, a new TSA Administrator issued a “Modified Determination” providing for union representation, but only “limited collective bargaining appropriate to the highly sensitive mission of the TSA.”²³ Specifically, the Determination expressly exempts from collective bargaining a host of defined subjects with security implications, thereby elevating the challenges that will confront the parties when negotiations occur.

As a result of this Determination, a secret ballot election was conducted, a collective bargaining representative was selected, and preparations for negotiations are underway. Recognizing that TSA must “institutionalize the culture of collaboration and employee engagement that is critical to its mission[,]” Administrator Pistole also directed that the “parties to and participants in

²¹ Pursuant to the “Train-the-trainer” program, experienced managers and union representatives are selected to serve as instructors themselves, capable of providing their counterparts with information and interactive skill building on a desired subject, in this case, effective labor-management forum design and implementation.

²² Christopher Marquis, “Threats and Responses: Airline Security: U.S. Transportation Leader Acts to Stop Screeners’ Union Effort.” *N.Y. Times*, January 10, 2003.

²³ Decision Memorandum, Determination, Transportation Security Officers and Collective Bargaining, issued by Administrator John S. Pistole, February 4, 2011.

collective bargaining negotiations ...attend [FMCS] joint training on interest-based negotiation prior to commencement of bargaining” and that negotiations thereafter be facilitated by one or more facilitators/mediators from the Federal Mediation and Conciliation Service.²⁴ Once again, utilizing an early, proactive intervention and outreach model, the FMCS is working with the parties to schedule the training and facilitated bargaining mandated by the Determination.

Part II: Other FMCS Early Intervention Programs and Practices

In a similar vein, FMCS has created a variety of other programs and techniques for intervening early to help manage labor-management conflicts.

A. Early intervention in collective bargaining negotiations

FMCS routinely reviews and analyzes its work in order to continuously improve the services and programs delivered to the labor-management community. Comparing the date of a first mediation session with the duration of any subsequent work stoppage shows that early FMCS intervention plays an important role in reducing the length of the work stoppage. Specifically, FMCS has found that when mediation occurs before the contract expiration date, the duration of an average work stoppage falls by more than 26 days—from 68 days to 42—as compared to cases where the first mediation session occurs after the expiration date. Thus, the timing of the FMCS’ involvement is an important element in reducing the duration of work stoppages, and logically this makes a great deal of sense. The later FMCS is first involved in the contract negotiation, the more likely it is that bargaining positions have become entrenched and attitudes more difficult to sway.

Mediation under our statutory scheme, however, is a voluntary process and FMCS mediation services can be requested at any time during contract negotiations, after a strike or lockout has begun, or not at all. Generally, parties to a collective-bargaining agreement need only provide the Agency with notice of a pending contract termination at least 30 days before the expiration of the agreement.²⁵ The parties, except in very limited circumstances, are not *required* to accept mediation. This is why the FMCS utilizes all the programs and services at its disposal to remain engaged with the parties and to encourage their use of mediation. Experience shows that parties satisfied with our services in one round of bargaining tend to request it in subsequent rounds.

B. Grievance mediation

Another early intervention model promoted by FMCS is grievance mediation. Most collective bargaining agreements include a grievance

²⁴ *Id.* at 11.

²⁵ National Labor Relations Act § 8(d), 29 U.S.C. 158(d)(3).

procedure, usually culminating in arbitration if the grievance is not settled beforehand. Grievance mediation is a completely voluntary step, taken prior to arbitration, which provides an opportunity for resolution by a third-party neutral. FMCS can offer grievance mediation as part of a larger program to help labor and management focus on their joint interests. FMCS mediators provide this service to the private and public sectors with the goal of preventing unresolved contract interpretation issues from spilling over into future contract negotiations. Lengthening the duration of a contract increases the desirability of resolving contentious issues arising during its term.

FMCS views the grievance mediation process as a means to fashion improved labor-management relations. While FMCS cannot involve itself in the mediation of all routine grievances, it can agree to mediate in the context of a full-service approach or within the framework of a larger, ongoing program, especially when grievance and arbitration mechanisms have broken down and disputes are not being resolved expeditiously. In these exceptional situations, FMCS uses grievance mediation to help parties establish better methods of conflict management and resolution.

C. Relationship development and training

As discussed in Part I above, proactive intervention and relationship building are essential when the parties are faced with complex and emotionally-charged issues, such as health care and public education reform. But teaching parties how to manage conflict over day-to-day workplace matters and routine negotiations is another important FMCS early intervention strategy. Labor and management representatives often recognize that new approaches are needed to deal with mutual problems. FMCS mediators deliver training programs that help management and labor improve their relationships, develop problem-solving techniques, and cultivate collaborative approaches to bargaining.

To meet these needs, FMCS offers a range of Relationship Development and Training (RDT) programs, such as those described below. But before beginning any training, FMCS mediators guide the parties through an assessment of the labor-management relationship and identify areas needing improvement. Once the training needs are determined, FMCS custom designs programs that suit these needs. These training programs not only improve the quality of the parties' relationships, but are also designed to provide processes and structures conducive to joint discussion and resolution. Learning and practicing these skills leads to more productive and competitive workplaces.

- *Contract Administration Training* helps the parties transform contract language into practice by addressing subjects such as relationship-building, definition of leadership roles, interpersonal and communications skills, and grievance handling.

- *Labor-Management Committee Training* helps the parties develop committees that collaborate on workplace solutions, such as safety or health care and wellness. These programs develop the parties' interpersonal skills through effective planning, group problem solving, brainstorming, group dynamics, and facilitation skill development.
- *Alternative Bargaining Processes:* Interest-based problem solving is an alternative to traditional negotiations, which focuses on the interests that are the root cause of a particular problem. The process encourages the use of objective standards to find solutions and the parties learn to replace traditional bargaining approaches with collaborative approaches to problem solving through active listening, interest-based communications, brainstorming, and consensus decision-making.

On occasion, FMCS confronts completely dysfunctional situations where, at bottom, the parties' bargaining relationship is broken. In such circumstances, FMCS offers highly specialized *Relationship-By-Objective (RBO)* training. The Agency starts by offering the parties a forum to engage in frank "no holds barred" discussions concerning how and why their relationship deteriorated. The relationship repair program then concentrates on processes by which labor and management may work more constructively starting with a strong commitment from both parties to improve their relationship. Through structured interaction, both parties identify specific problem areas and develop mutually-agreeable objectives to address the issues. A restructured relationship is created with mutually chosen objectives. Agreed-upon action steps and timetables are planned, and timetables for their resolution.

Conclusion

The purpose of this paper was to provide an overview of the FMCS's strategic initiatives during my tenure as Director. Simply put, the Agency has endorsed and implemented a proactive outreach approach designed to assist parties, through a variety of alternative training and facilitation services, in establishing and developing constructive labor-management relationships. In our judgment, this initiative is especially relevant given the multitude of complex, contentious issues that confront the parties during these most difficult economic times. Experience has taught us that the public interest would be better served were the parties to address these issues in an informal, transparent setting far in advance of the trauma of contract expiration.